SUPREME COURT OF THE UNITED STATES.

No. 11.—October Term, 1925.

Anna Woerishoffer et al., Executors, vs. The United States. } Appeal from the Court of Claims.

[November 16, 1925.]

Mr. Justice Brandeis delivered the opinion of the Court.

On January 26, 1916, the executors of Oswald Ottendorfer of New York City brought this suit in the Court of Claims to recover the sum of $543,708.44 voluntarily paid by them on December 10, 1902, for legacy taxes assessed under the Spanish War Revenue Act, June 13, 1898, c. 448, § 29, 30 Stat. 448, 464, as amended. Section 29 had been repealed by Act of April 12, 1902, c. 500, § 7, 32 Stat. 96, 98, 99, the repeal to take effect July 1, 1902; but by a proviso all taxes theretofore imposed were continued in force. The time for presenting claims for the refunding of any tax under § 29 alleged to have been illegally assessed or to have been excessive or in any manner wrongfully collected was extended by Act of July 27, 1912, c. 256, 37 Stat. 240. The executors sought recovery of the whole amount paid on the ground that the tax had not been imposed prior to July 1, 1902. Recovery of part of the amount was sought also on the ground that it was assessed upon legacies which had not vested in possession or enjoyment prior to that date. There is no claim here that the assessment was excessive. The lower court dismissed the petition, 58 Ct. Cl. 410. The case is here on appeal allowed June 25, 1923, under § 242 of the Judicial Code.

The testator died on December 14, 1900. His will was duly probated and the executors qualified on March 28, 1901. There were some specific legacies; a residuary bequest which gave the bulk of the estate to three step-daughters free from any trust, and a provision that all legacy or inheritance taxes should be paid out of the residue. The assets consisted largely of listed securities. On March 7, 1902, schedules were filed in the Surrogate's Court containing a description and the estimated value of all of the

property known by the executors to have been owned by the testator at his death, together with statements of decedent's debt, of the payments for administration expenses, of estimated commissions of the executors, and of further administration expenses. On June 5, 1902, the appraiser appointed by the Surrogate's Court filed his report appraising the property of decedent, but it was not until July 16, 1902, that the Surrogate's order assessing thereon the New York inheritance tax was entered. The value of the personal property which passed to the executors was returned by them as $4,371,947.90. The debts and expenses to be set off against that sum were reported as $298,646.12. The assessment of the tax here in question was made by the Commissioner of Internal Revenue on December 10, 1902, in accordance with the executors' return which had been filed with him on November 7, 1902.

Under the laws of New York, the time for the presentation of claims against the estate had expired before July 1, 1902, and before that date the legatees were entitled to the full payment of their legacies. Under the laws of the United States, Act of March 2, 1901, c. 806, § 11, 938, 948, the time within which payment of the tax was required to be made had also expired before July 1, 1902. Before that date, all the testators' debts and all the specific legacies had been paid, and each of the residuary legatees had received on account of the residuary bequest, $910,900, partly in cash and partly "in securities at New York Stock Exchange values" assented to by the legatees. Between that date and the end of the year 1908 each received in cash further sums aggregating $210,953.66. Some of the assets were still undistributed when the evidence was taken in this suit. The reason why no further or complete distribution of the residuary estate was made by the executors prior to July 1, 1902, was that they anticipated that the estate would be liable for payment of a New York estate transfer tax and the federal inheritance tax, for attorneys' fees and other expenses of administration, and that the exact amount of the residuary estate left for distribution could, therefore, not be definitely determined prior to July 1, 1902.

The contention that the taxes had not been imposed prior to July 1, 1902, because no formal assessment had in fact been made by the Treasury Department before that date is disposed of by *Cochran* v. *United States*, 254 U. S. 387. The contention that the interests of the residuary legatees in that portion of the estate not

distributed prior to July 1, 1902, were contingent beneficial interests not absolutely vested in possession or enjoyment is disposed of by *Kahn* v. *United States*, 257 U. S. 244, *Simpson* v. *United States*, 252 U. S. 547, and earlier cases. An objection is made to the procedure pursued in the Court of Claims. The Government originally demurred to the petition. The demurrer was overruled without prejudice, and it was ordered that the testimony be limited to "the question of the amount of the residuary legacies not distributed until after July 1, 1902." Thereafter evidence was taken and the court made its findings. It is urged that the court erred in making findings of fact upon the entire case; that there are some findings inconsistent with allegations of the petition relating to matters other than those named in the order; and that as to such other matters the allegations of the petition must be taken as true. We have not discovered any inconsistency as to any material fact. Moreover, it does not appear that the executors objected below either to the order restricting the scope of the evidence or to findings of fact made.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.